

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>JOSHUA LEE KELLEY,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>JAIL ADMINISTRATOR, YORK</b>	)	
<b>COUNTY JAIL,</b>	)	
	)	
<b>Defendant</b>	)	
_____	)	<b>CIVIL No. 01-120-P-C</b>
	)	
<b>ANTHONY JAMES HOGY</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>YORK COUNTY JAIL,</b>	)	
<b>MICHAEL VITIELLO,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION**

The above-referenced consolidated<sup>1</sup> cases are before the court on defendant Michael Vitiello's<sup>2</sup> motions to dismiss (Docket Nos. 6 and 9). Upon careful consideration of the pleadings before this court, I now recommend the complaints be **DISMISSED** pursuant to 28

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<sup>1</sup> On August 8, 2001, following the expiration of the 21-day response time, I granted defendants' motions to consolidate these two cases as neither plaintiff had objected to that motion. Following entry of my Order plaintiff Kelley sent me a letter objecting to the consolidation. I issued an Order indicating that if he wished to object to my Order of consolidation he would have to do so within the confines of Rule 72 (a), Fed. R. Civ. P. On August 20, 2001, he filed a pleading which we have treated as his objection to Order of consolidation.

<sup>2</sup> Both complaints identify Michael Vitiello, Jail Administrator, York County Jail, as the only named defendant (See page 3 of each form § 1983 complaint). I do not take the slight variations in the captions as indicative of anything.

U.S.C. § 1915A (Supp. 2001) and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

### **Rule 12(b)(6) and Prisoner Litigation**

Congress has provided that it is appropriate to review these prisoners' § 1983 complaints at this stage to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief can be granted," or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b) (Supp. 2001); see also id. § 1915(e)(2)(B) (Supp. 2001).

In considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiff's favor, and determine whether the complaint, when taken in the light most favorable to the non-movant, sets forth sufficient facts to support the claims for relief. Clorox Co. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1<sup>st</sup> Cir. 1998).

### **The Allegations**

Plaintiff Joshua Kelley filed his complaint on April 21, 2001, alleging the following:

Upon arriving at York County Jail Feb. 8th 2001 I was place[d] in holding tank #2 for a period of six nights and seven days. During that extenuous [sic] amount of time, I recieved [sic] no recreation. I was allowed only one shower, and got to brush my teeth only once. I was also wearing the same clothes the whole time I was in their holding tank. I was also given a blanket from only 11 p.m. – 6 a.m., while sleeping on a cement floor, due to the fact there wasn't enough room to sleep on either of the two benches.

Plaintiff Anthony Hoky (a/k/a Hoby) filed his complaint on May 22, 2001, alleging the following:

I was held in a holding tank upon arrival at York County Jail, for a period of 5 nights and 6 days. During [this] time I was only given one shower and allowed to brush my teeth once. I was also given no recreation time and [was] not [] given a clean change of cloths [sic]. Also I was forced to sleep on a cement floor due to the crowded [sic] nature of the jail and only given a blanket from 11 p.m. – 6 a.m.

Each prisoner was granted leave to proceed *in forma pauperis*, but cautioned by my order that their complaints were particularly susceptible to dismissal under the applicable standards. Both plaintiffs notified the court that they understood their payment responsibilities pursuant to 28 U.S.C. § 1915(b)(1) and wished to proceed nevertheless. Neither plaintiff sought to amend his complaint as a result of my earlier order, but plaintiff Kelley did “clarify” that his status was that of pretrial detainee rather than sentenced prisoner.

Following service of process,<sup>3</sup> defendant Vitiello responded to each complaint with a motion to dismiss. Hogg has never responded to Vitiello’s motion. Kelley responded to the motion and also provided some new or additional information relating to an individual named Frank Maschoff, who apparently was the officer who investigated Kelley’s grievance and responded to him. Even if the additional information were treated as an attempted amendment to the complaint (it is not), the “new allegations” do not state any claim against Maschoff other than that he reviewed Kelley’s grievance and attempted to explain to him why he was held in a holding cell for the number of days indicated.

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<sup>3</sup> Defendant Vitiello raises a preliminary skirmish about the service of process. I gather from the content of the motion to dismiss that the document served upon defendant was not a copy of the actual complaint filed in this matter. (See Docket No. 8, Ex. A). The substance of the document actually served more or less mirrors the factual allegations found in the complaint filed with this court. To the extent that defendant argues that plaintiff Kelley did not allege that he complied with the grievance procedure and does not indicate what authority his complaint is based upon, I have disregarded those arguments because the complaint filed with the court does meet those requirements.

## Discussion

Both plaintiffs have named Michael Vitiello as the sole defendant in this action, alleging only that he is the jail administrator at the York County Jail. They have not alleged that Vitiello was personally involved in any way in the deprivations they claim were visited upon them. There is no allegation that he personally withheld blankets, toothbrushes, or any other item from them. Clearly, as a supervisory official he is not responsible for the constitutional violations of those he supervises in the absence of his knowledge of their conduct. There is no *respondeat superior* liability under section 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)). “[L]iability in damages can only be imposed upon officials who were involved personally in the deprivation of constitutional rights.” Pinto v. Nettleship, 737 F.2d 130, 132 (1st Cir. 1984)). Thus, even if the deprivations complained of by the plaintiffs do rise to the level of constitutional violations, Vitiello would not be liable for damages absent an allegation that his action or inaction as a supervisor was “affirmatively linked” to the unconstitutional behavior of his subordinates and that his conduct or inaction itself amounted to “reckless or callous indifference” to the plaintiffs’ constitutional rights. Miller v. Kennebec County, 219 F.3d 8, 13 (1st Cir. 2000). Plaintiffs have made no such allegation, mentioning Vitiello’s name only in the caption and identifying him only as the Jail Administrator.

Therefore, plaintiffs’ complaints, if they have any viability at all, must be read as complaining of the general policy, custom, or usage at the York County Jail of keeping inmates in holding cells for up to a week. It is apparent in their virtually identical prayers for relief that each inmate, in addition to seeking monetary damages, is also seeking injunctive relief against the practice of retaining prisoners in holding cells for up to a week under the conditions outlined.

If it is that type of lawsuit that the plaintiffs seek to bring, they may avoid some of the more draconian strictures of the Prisoner Litigation Reform Act, such as 42 U.S.C. § 1997e(e), which would require them to plead and prove actual physical injury in order to recover monetary damages for their individual mental or emotional injury. Of course, if this lawsuit is indeed a quest for injunctive relief grounded upon an unconstitutional municipal custom or practice, the plaintiffs did not bring the right defendant before the court when they sued Michael Vitiello in his personal capacity. See, e.g., Miller v. Kennebec County, 219 F.3d 8, 12 (1st Cir. 2000) (discussing § 1983 custom or practice claim against Knox County for allegedly unreasonable search conducted at Knox County Jail).

My remarks are not intended to suggest that if the county and/or the policy making officials (who might or might not include Vitiello) were named as defendants in the identical complaint, the complaint would not be subject to dismissal. Indeed, it probably would be in the absence of some additional factual allegations relating to the pervasive nature of the custom or policy that make it “attributable to the municipality”<sup>4</sup> and/or the municipal policy makers and identifying the custom as the “moving force behind the deprivation of constitutional rights.” Id. (quoting Bordanaro v. McLeod, 871 F.2d 1151, 1157 (1st Cir. 1989)). Finally, it goes without saying that even if the plaintiffs could submit a properly pleaded complaint, the question of whether or not, as a matter of law, the challenged conduct amounts to a constitutional deprivation for pretrial detainees is still unclear. A pretrial detainee<sup>5</sup> has a different cache of constitutional protections than a convicted prisoner. Clearly it is impermissible to punish a

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<sup>4</sup> Counties are included within the term municipality. Bd. of the County Comm’rs v. Brown, 520 U.S. 397, 399 (1997). See also Black’s Law Dictionary 1037 (7th ed. 1999) (defining municipal corporation as “[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local affairs.”).

<sup>5</sup> I am assuming for purposes of this discussion that both plaintiffs are pretrial detainees. The record is far from clear on that score. However, based on Kelley’s memorandum in opposition, it appears that he, at least, would be able to plead that status.

detainee for a crime prior to a determination of guilt. Bell v. Wolfish, 441 U.S. 520 at 535 & n.16 (due process requires that a pretrial detainee not be punished; the Eighth Amendment requires that the punishment imposed not be cruel and unusual). However, courts have recognized that it is sometimes difficult to define a fruitful methodology for distinguishing between punitive and non-punitive actions against pretrial detainees.<sup>6</sup> Rapier v. Harris, 172 F.3d 999, 1005 (7th Cir. 1999). Without attempting to articulate a standard at this juncture, it suffices to say that it is not clear whether a one-week period of solitary confinement without any opportunity for recreation, without a mattress, and without access to a toothbrush and shower rises to the level of a constitutional violation.

Until plaintiffs file a complaint setting forth clearly the nature of their underlying action, it is impossible to state with any certainty whether these deprivations amount to constitutional violations entitling the plaintiffs, not to monetary damages but rather to injunctive relief.

### **Conclusion**

Based upon the foregoing I recommend that each complaint be dismissed for failure to state a claim against the named defendant.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

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<sup>6</sup> It may be a particularly thorny issue in Kelley's case because he alludes to the fact that the nature of his pending charge was what led to his extended confinement in a holding cell. However, none of those facts appear in his current complaint.

Dated:

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Margaret J. Kravchuk  
U.S. Magistrate Judge

LEAD BANGOR  
PR1983

U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 01-CV-120

KELLEY v. YORK COUNTY JAIL ADM Filed: 04/27/01

Assigned to: JUDGE GENE CARTER

Demand: \$0,000 Nature of Suit: 555

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

JOSHUA LEE KELLEY JOSHUA LEE KELLEY  
plaintiff [COR LD NTC pse] [PRO SE]  
YORK COUNTY JAIL  
RR 1, BOX 64  
Alfred, ME 04002

ANTHONY JAMES HOGY ANTHONY JAMES HOGY  
consolidated plaintiff [COR LD NTC] [PRO SE]  
359 MILTON MILLS RD  
ACTON, ME 04001

v.

YORK COUNTY JAIL ADMINISTRATOR MICHAEL J. SCHMIDT, ESQ.  
defendant [COR LD NTC]  
WHEELER & AREY, P.A.  
27 TEMPLE STREET  
P. O. BOX 376  
WATERVILLE, ME 04901  
873-7771